

THE HONOURABLE SRI JUSTICE SANJAY KUMAR

ARBITRATION APPLICATION NO.58 OF 2013

ORDER

M/s.IL&FS Engineering and Construction Company Limited, (formerly known as Maytas Infra Limited), filed this application under Section 11(5) & (6) of the Arbitration and Conciliation Act, 1996 (*for brevity*, 'the Act of 1996'), seeking appointment of an Arbitrator to adjudicate its claims and disputes with M/s.Kanyaka Electricals & Engineering Private Limited, Hyderabad, in relation to the purchase orders dated 21.08.2009, 21.08.2009, 21.08.2009, 24.08.2009 and 24.08.2009 respectively.

Notice having been ordered, the respondent company entered appearance through Sri A.Manohar Reddy, learned counsel, and filed its counter-affidavit. However, there was no representation for the respondent company when the matter was taken up for hearing on 31.01.2019 and again, on 07.02.2019. Having heard the learned counsel for the applicant, this Court reserved orders.

The applicant company was awarded the contract of construction, supply, erection, testing and commissioning of lines and sub-stations under Gandikota Lift Irrigation Scheme on turnkey basis by the Andhra Pradesh Transmission Corporation Limited. The applicant company claims that it was approached by the respondent company seeking to supply certain equipment/material required for erection of the sub-stations. Having accepted its proposal, the applicant company placed purchase orders upon the respondent company on the dates set out *supra*. Alleging that some of the equipment/material supplied by the respondent company was defective and of inferior quality and that the respondent company failed to replace the same despite repeated requests or reimburse the balance amount of

Rs.28,43,358/-, after adjusting the amount paid towards the supplies made, the applicant company got issued legal notice dated 12.09.2012 to the respondent company drawing its attention to Clause 12 of the purchase orders and seeking resolution of the disputes between them by way of arbitration, in terms thereof. The applicant company nominated Sri N.Vidya Prasad, Retired District Judge, as the sole Arbitrator. In response thereto, the respondent company got issued reply legal notice dated 04.10.2012. Therein, it denied the version and claim of the applicant company and raised a counter-claim for Rs.3,28,908/- along with interest. It further stated that the arbitration clause had no binding force on either party and that the applicant company could not unilaterally appoint an Arbitrator. According to it, there was no arbitrable dispute that could be referred to arbitration as the arbitration clause itself was very vague and could not be enforced by either party. The respondent company accordingly called upon the applicant company to withdraw its notice unconditionally and also the nomination of the sole Arbitrator.

As per the present application, the applicant company's claim is quantified at over Rs.30,00,000/-.

In its counter-affidavit, the respondent company admitted issuance of the subject purchase orders. It also admitted that the terms and conditions in respect of the supplies and payments were clearly mentioned in the said purchase orders. It however claimed that the applicant company did not make excess payment to the tune of Rs.28,43,358/- and asserted that as per its books of accounts, the applicant company still had to pay it a sum of Rs.3,28,908/- along with interest thereon. It further claimed that the applicant company had not lifted the material ordered by it worth

Rs.64,41,096/- and asserted that the applicant company had to pay the said amount to it.

Perusal of the purchase orders demonstrates that each and every one of them contained the identical Clause 12 titled 'Disputes / Arbitration'. This clause reads as under:

'12. Disputes / Arbitration

All disputes and differences arising out of the connection(s) with this order failing amicable settlement shall be referred to arbitration under the Indian Arbitration and Conciliation Act 1996 or any statutory modification thereof in force at that time. The venue of such arbitration shall be at Hyderabad. However work as contracted shall not be suspended during proceedings.'

In terms of Section 11(5) & (6) of the Act of 1996, as amended by Act 3 of 2016 with effect from 23.10.2015, in an arbitration with a sole Arbitrator, if the parties fail to agree on the arbitrator within thirty days of receipt of a request by one party from the other party to so agree, the appointment shall be made, upon request of a party, by the High Court or any person or institution designated by such Court. As this Court is given the provision to deal with applications under Section 11 of the Act of 1996 by the Hon'ble The Chief Justice, High Court for the State of Telangana, it would be within its power to undertake the exercise contemplated by Section 11(5) & (6) of the Act of 1996. As per Section 11(6A) of the Act of 1996, which was inserted therein by Act 3 of 2016 with effect from 23.10.2015, the High Court, while considering an application under Section 11(5) & (6) of the Act of 1996 shall confine itself to examination of the existence of an arbitration agreement and no more.

Be it noted that each of these purchase orders is admitted by the respondent company. Once the arbitration agreement contained in each of these purchase orders is admitted by the respondent company, it is not for

this Court to examine the validity of such arbitration agreement after amendment of the Act of 1996 by Act 3 of 2016 with effect from 23.10.2015.

In the case on hand, the existence of the purchase orders and the arbitration agreement in Clause 12 thereof is not in dispute. That being so, the applicant is entitled to appointment of an independent Arbitrator. As Sri N.Vidya Prasad, Retired District Judge, is no more, his nomination by the applicant company has worked itself out.

In that view of the matter, the arbitration application is ordered appointing Smt. M.Vijaya Lakshmi, Retired District Judge, residing at House No.135, Maple Town, Near Sun City, Hydershakote, Hyderabad-500091, as the sole Arbitrator for resolution of the dispute(s) between the applicant and the respondent, arising out of the purchase orders dated 21.08.2009, 21.08.2009, 21.08.2009, 24.08.2009 and 24.08.2009 respectively, in accordance with the provisions and mandate of the Act of 1996. The learned Arbitrator shall be entitled to fees as per the rates specified in the Fourth Schedule to the Act of 1996, inserted by Act 3 of 2016 with effect from 23.10.2015, which shall be borne by both parties in equal measure. No order as to costs.

SANJAY KUMAR, J

13th FEBRUARY, 2019

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